United Nations AT/DEC/1121

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1121

Case No. 1234: SAFFIR Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Kevin Haugh, Vice-President, presiding; Mr. Spyridon Flogaitis; Ms. Jacqueline R. Scott;

Whereas at the request of John Saffir, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time limit for filing an application with the Tribunal until 31 August 2001 and thereafter until 30 November 2001;

Whereas, on 28 November 2001, the Applicant filed an Application containing pleas which read, in part, as follows:

"II: PLEAS

...

11. On the merits, the Applicant respectfully requests the Tribunal to find:

... ;

That the decision to separate [the Applicant] from service as of 1 August 1998 was improperly motivated by extraneous considerations and was flawed by procedural irregularities ...

That the decision ... to terminate [the Applicant's] appointment, without review and response to his allegations of discriminatory treatment was a denial of due process and an abuse of authority; and

That the above contested decision was in violation of [General Assembly] resolution [37/126] ...

12. ... [and] to order:

That [the Applicant] be fully reinstated retroactively from 1 August 1998 ... with all formal and financial consequences including [his] reintegration into the [United Nations Joint Staff] Pension Fund [(the Pension Fund)] and replacement into the Pension Fund of the money [that the Applicant] was compelled to withdraw there-from as a result of his wrongful termination; and

That the [Applicant] be awarded damages in the amount of two (2) years net base salary ..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 March 2002 and once thereafter until 31 May 2002;

Whereas the Respondent filed his Answer on 24 may 2002;

Whereas the Applicant filed Written Observations on 16 July 2002 and, on 5 November 2002, the Respondent submitted comments thereon;

Whereas the facts in the case are as follows:

The Applicant joined the Organization on 18 August 1992, on a short-term appointment, as an Inventory and Supply Clerk at the G-2 level, in the Distribution Section, Office of Conference Services (OCS). Effective 24 December 1992, the Applicant's appointment was extended and converted to a fixed-term appointment and, effective 1 September 1994, he was promoted to the G-3 level.

On 9 December 1994, the Director, Conference Services, recommended that the Applicant's appointment, among other staff members whose appointments were due to expire on 31 December, be extended for a period of six months "as replacement for staff on mission, on loan to other Departments, or Special Leave Without Pay". The Applicant's contract was so extended and subsequently extended again. On 5 December 1995, the Director, Conference Services, recommended that the Applicant's fixed-term appointment, due to expire on 31 December, be extended by a further two-year period, noting that the Applicant, as well as four other staff members mentioned, were against established posts and that their performance had been very good.

On 15 December 1995, the Office of Human Resources Management (OHRM) notified the Executive Office, Conference Services, that due to the prevailing financial situation of the Organization, only a three-month extension could be authorized. However, on 20 December, OHRM informed that they were in a position to endorse a one year extension. The Applicant's contract was so extended, and subsequently extended several more times.

In the context of 1998-1999 Redeployment Programme, it was decided that the fixed-term appointments of four staff members in the Distribution Section, would not be renewed. Subsequently, on 2 December 1997, the Under-Secretary-General for Management sent a memorandum to the Heads of Departments/Offices, providing guidance on procedures to be followed including the establishment of joint panels to deal with staff redeployment.

On 5 December 1997, the Applicant was informed that his fixed-term appointment would be extended for a final period of one month, through 31 January 1998.

In accordance with the procedures outlined in the 2 December 1997 memorandum, an ad hoc joint Department of General Assembly Affairs and Conference Services (DGAACS) staff/management advisory panel met and reviewed the performance of 26 General Service staff members, including the Applicant. The panel submitted its report on 23 December 1997, identifying only four staff members for redeployment, not including the Applicant.

In February 1998, a number of staff members in the Distribution Section, including the Applicant, filed complaints with the Panel on Discrimination and Other Grievances, concerning the "general conditions of work in the Distribution Section".

On 1 March 1998, the Applicant was given a five-month contract, transferring him from an established post to the post of another staff member, who was on mission and scheduled to return to Headquarters on 31 July 1998.

On 22 April 1998, the Deputy Chief, Distribution Section, recommended that the Applicant's contract be extended. However, on 25 June, the Applicant was informed that, due to the impending return from mission of the staff member whose post the Applicant was placed against, his fixed-term appointment would not be extended beyond 31 July.

On 23 July 1998, the Coordinator, Panel on Discrimination and other Grievances, wrote to the Assistant Secretary-General, OHRM, drawing her attention to the adverse work situation in the Distribution Section, DGAACS, and informing of the Panel's belief that

> "the principal cause of the current negative situation in staff/management relations in the Section is the managerial style, personnel practices and procedures of its Chief ... The Panel, ... recommends that the implementation of a series of recent personnel decisions made by the Chief of Section be suspended pending the outcome of such review. The matter is urgent, since ... two staff members will not have their contracts renewed as from 1 August."

On 31 July 1998, the Applicant separated from service. On the same date, he wrote to the Secretary-General requesting administrative review of the decision not to renew his fixed-term appointment.

On 12 November 1998, the Applicant lodged an appeal with the Joint Appeals Board (JAB).

On 14 December 1998, a Staff/Management Task Force convened by the Under-Secretary-General for Management, to review the working conditions, management issues and practices, work processes and structure of the Distribution Section, adopted its final report and made, inter alia, the following recommendation:

> "...
>
> Every effort should be made to re-employ Mr. John Saffir and ... on fixed-term appointments. Priority should be given to reabsorbing them in the Distribution Section, where their past experience would give them a comparative advantage. If reabsorption in the Distribution Section is not feasible, consideration should be given to any other future openings in a related occupation group or elsewhere in the Secretariat, without prejudice to their eligibility for consideration for future vacancies in the Distribution Section.
>
> The Department of Management should review the possibility of providing two posts in the Distribution Section for the early re-employment of the two former staff members".

Consequently, effective 3 May 1999, the Applicant was rehired on a fixed-term appointment in DGAACS.

The JAB adopted its report on 2 October 2000. Its considerations and recommendation read, in part, as follows:

"***Considerations***

...

32. The Panel found that the Appellant had to separate from the Organization as a result of the mismanagement problems that his section was facing during that time. The Panel was satisfied with the fact that the above was recognized by the Staff/Management Task Force's report and by its recommendation to re-employ the Appellant. The Panel took note that, based upon the above, the Appellant was rehired on a fixed-term appointment in May 1999, and since then, he is serving with DGAACS. The Panel agreed with the Respondent that the contested decision was moot due to the subsequent decision to rehire the Appellant.

33. ... The Panel noted that although the above separation indicated serious mismanagement, this was not tantamount to an action motivated by extraneous considerations and flawed by procedural irregularities. The Panel felt, therefore, that the rehiring of the Appellant rectifies the harm he suffered from his separation and there is no need for recommending additional compensation.

...

35. The Panel did not feel it could recommend the Appellant's retroactive reinstatement bearing in mind that the Appellant held a fixed-term appointment. However due to the special circumstances of this case, the Panel agreed with the Appellant that the Administration should take the necessary action so that the Appellant would not suffer any financial consequences with regard to the Pension Fund ...

Recommendation

36. The Panel *unanimously recommended* that the Organization takes the necessary steps, by paying its part and the Appellant's part to the Pension Fund, to reintegrate the Appellant into the Pension Fund so that there will be no break in his pension contributions despite his seven months of non-service.

..."

On 13 February 2001, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him that the Secretary-General had decided to accept the JAB's unanimous recommendation.

On 28 November 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The decision to rehire the Applicant in May 1999 does not render moot the decision not to renew his contract in August 1998.

2. The Respondent should pay the Applicant the nine months wages, which he was wrongfully denied by the decision not to renew his appointment.

3. The decision not to renew his appointment was tainted by procedural irregularities and a personal vendetta against him. The Applicant's rights of due process were violated.

Whereas the Respondent's principal contentions are:

1. The Applicant served on a fixed-term appointment, which does not carry any expectancy of renewal. The decision not to renew the Applicant's appointment did not violate his rights.

2. The decision not to renew the Applicant's appointment was not vitiated by improper motives or any other extraneous factors.

The Tribunal, having deliberated from 30 June to 24 July 2003, now pronounces the following Judgement:

I. Immediately prior to 31 July 1998, the Applicant had been employed by the Organization under a fixed-term contract as a Documents Clerk, DGAACS. On that date he was separated from service on the expiration of his fixed-term contract.

The Applicant's said separation from service had been preceded by a long period of financial uncertainty within the United Nations. This regime had been in existence for at least some years prior to the Applicant's separation from service as, in 1995, despite a recommendation that the contracts of the Applicant and other staff members on fixed-term contracts should be extended for a further two years, OHRM could only authorise a three month interim extension "in light of the then prevailing financial circumstances"

II. On 13 October 1997, the Under-Secretary-General for Management wrote to all Heads of Departments/Offices concerning the proposed programme budget for the 1998-1999 biennium, which contained post reductions that would take effect 1 January 1998. Some twelve General Service posts in the DGAACS

Distribution Section were slated for abolition, effective on that said date. Of those twelve posts, seven were vacant, one was encumbered by a staff member who had been recommended for an agreed termination and four were encumbered by staff on fixed-term appointments. Sometime prior to 2 December 1997, since no Secretariat-wide procedures had been issued for staffing arrangements in the light of the forthcoming post reductions, DGAACS had reviewed its operational requirements and the performance of General Service staff in the Department and decided not to renew the fixed-term appointments of four staff members, including the Applicant.

On 5 December 1997, the Executive Officer, DGAACS, informed the Applicant that "[his] fixed-term appointment which expires on 31 December 1997 will be extended for a final period of one month, i.e. through 31 January, 1998". Meanwhile, by memorandum dated 2 December 1997, the Under-Secretary-General for Management wrote to the Heads of Departments/Offices indicating that the 1998-1999 budget had been approved by the General Assembly and that measures were being put in place to identify and deploy staff as a result of the post reductions. In that regard he provided Secretariat-wide guidance as to the procedures to be followed to identify those staff members to be reassigned within the Department/Office, those staff members to be reassigned outside the Department/Office and those whose fixed-term appointments would not be extended and thus terminated.

Pursuant to the provisions of the said memorandum, an ad hoc DGAACS Staff/Management Advisory Panel on the Distribution Section (hereinafter referred to as the "ad hoc Panel") met for the purpose of implementing the instructions set out in the memorandum and on 23 December it duly submitted its first report review. The ad hoc Panel had reviewed the overall performance of some twenty-six General Service staff members, including the Applicant. It identified just four staff members for redeployment, which number did not include the Applicant. It concluded that since there were "no expected vacancies within the Department suitable to accommodate any of the fixed-term staff members identified for redeployment", OHRM should "be asked to look for posts on which they could be redeployed, on the understanding that the staff members concerned would be considered, if need be, for mission assignments prior to any other possible action".

III. In February 1998, the Applicant, along with other staff members in the Distribution Section, filed complaints with the Panel on Discrimination and other Grievances concerning the Distribution Section's handling of administrative and personnel matters.

IV. On 1 March 1998, the Applicant was given a contract for five months and was transferred from a permanent post to the post of a staff member serving on a field mission and due to return to Headquarters on 31 July 1998. The said staff member duly returned to Headquarters and resumed duty there on that date and, since the Applicant's fixed-term contract thereupon expired, he was separated from service with effect from 1 August 1998.

V. The Applicant's principal submission is not so much that the Administration was not entitled to abolish the various posts in the light of the prevailing financial circumstances, or that the post reductions were in themselves unauthorised, but rather that he was unfairly selected for separation. He submits that the process whereby he was selected for separation was objectively unfair and motivated by personal prejudice and that he was singled out for separation by reason of a personal vendetta against him. The Applicant argues that he enjoyed seniority and superior performance ratings over some of his colleagues within DGAACS, whose contracts were extended, renewed or who were redeployed within the Organization. The Applicant further submits that, because the Administration has failed to put forward reasons which, he believes, would justify his separation, the decision to separate him should be considered to have been vindictive or motivated by prejudice or some extraneous factor.

In effect he submits that it is for the Respondent to put forward evidence to negative malice and, that a failure to offer such convincing evidence should cause the Tribunal to conclude that his separation was actuated by malice or unfairness.

VI. The Applicant submits that, by reason of the circumstances in which he was separated, he should be reinstated in the position occupied by him as if he had never been separated and that he should be paid compensation for the various losses and expenses which he claims to have suffered. He further claims that the contract given to him as of 1 March 1998, when he was given a five-month fixed-

term contract and placed against a mission replacement post, was not a decision made for a bona fide motive, nor made in his interests. Rather, he claims that this transfer was made so as to increase his vulnerability, with the intention of separating him from service on the return of the said staff member to Headquarters. This, according to the Applicant, provides further evidence of the vendetta, which he claims was being waged by the Chief of the Distribution Section against him.

The Applicant neither cites nor identifies any of the Rules or Regulations or any of "the well established or appropriate procedures" that he alleges were breached, nor does he put forward any factual evidence that a personal vendetta was being waged against him. Rather, he appears to hope that the Tribunal will be able to find a breach of some Rule or Regulation applicable to his generalised complaints and that malice or a campaign of victimisation will be inferred. The Applicant argues that, "since he was separated without any rational or valid reason", such a malicious or vindictive motive should be inferred. He further appears to rely on various observations, findings and recommendations made by both the Panel on Discrimination and other Grievances and by the Staff/Management Task Force on the Distribution Section, both of which were highly critical of the style and competence of the management of the Section, in general, and the Chief of the Section, in particular. The Panel and the Task Force concluded that the mismanagement of the Section caused problems, which bore negatively on the general conditions of work within the Section. In addition, such mismanagement was found to have resulted in decisions that lacked transparency and that were made without appropriate consultation. The Applicant offers these findings as evidence that the decision to separate him from service was unwarranted, malicious or otherwise infirm. The Applicant further relies on a recommendation made by the Task Force "that the Department of Management should review the possibility of providing two posts in the Distribution Section for the early re-employment of the two former staff members", this being a reference to the Applicant and another staff member, who had been similarly separated from service from the Distribution Section in like circumstances and around the same time.

VII. The Applicant had, prior to the JAB's deliberations on his appeal, been re-employed by the Organization, honouring the recommendation which had been made by the Staff/Management Task Force.

VIII. The JAB, in its report, had expressed a finding that the Applicant had to separate from the Organization as of 1 August 1998, "as a result of the mismanagement problems that his section was facing during that time". It continued:

> "[t]he Panel was satisfied with the fact that the above was recognized by the Staff/Management Task Force's Report and by its recommendation to re-employ the [Applicant]. The Panel took note that, based upon the above, the [Applicant] was rehired on a fixed-term appointment in May 1999, and since then, he is serving with DGAACS. The Panel agreed with the Respondent that the contested decision was moot due to the subsequent decision to rehire the [Applicant]."

The Tribunal does not agree with the JAB's conclusion. The fact that the Applicant was re-hired does not render the contested decision moot. For a period of seven months, the Applicant was not employed and, if the decision to separate him was taken in violation of his rights, this would warrant his compensation for these seven months of unemployment.

IX. As to the Applicant's submission that his separation from service had been motivated by malice or by consideration of extraneous factors, the JAB noted "that although the above separation indicated serious mismanagement, this was not tantamount to an action motivated by extraneous considerations and flawed by procedural irregularities". The Panel felt therefore that the rehiring of the Applicant "rectifies the harm he suffered from his separation and there is no need for recommending additional compensation."

The JAB did not recommend that the Applicant be reinstated retrospectively from 1 August 1998, but recommended that "due to the special circumstances of this case" that the Organization "should take the necessary steps, by paying the Organization's part and the [Applicant's] part to the Pension Fund, to reintegrate the [Applicant] into the Pension Fund so that there will be no break in his pension contributions despite his seven months of non-service".

By letter dated 13 February 2001, the Respondent confirmed his acceptance of that said recommendation. The Tribunal can find nothing in the said letter to suggest that

the Respondent had accepted that the Applicant had been unfairly or improperly selected for separation. The Respondent accepted the JAB's recommendation to make good the pension contributions for the period between 1 August 1998, when the Applicant was separated from service and 3 May 1999, when he was re-employed by the Organization. However, since the Applicant had at the time of his separation from service, made a withdrawal from the Pension Fund by way of reclaiming earlier contributions and since he has failed to repay to the Pension Fund the amount so withdrawn, it has not been possible for the Respondent to integrate the Applicant in the manner recommended and it will not be possible to do so, unless and until the Applicant makes repayment of the sum so withdrawn. However, it appears that the Respondent remains willing to make the payments recommended by the JAB should the Applicant repay the monies he had withdrawn.

X. Dealing now with the Applicant's claims that he has been separated from service as a result of malice or of a personal vendetta waged against him, it is the well established jurisprudence of the Tribunal that the Applicant carries the onus of proving this allegation by offering convincing evidence in support thereof. (See, for example, Judgements No. 834, *Kumar* (1997) and No. 874, *Abbas* (1998).)

The Tribunal, like both the JAB and the Staff/Management Task Force on the Distribution Section, has failed to identify any convincing evidence in support of the proposition. The Tribunal is satisfied that the JAB was in error when it appears to have concluded that the Task Force, either by its findings or by its recommendations, had established that the Applicant's separation had been brought about by mismanagement problems. No such finding was made, nor, on the Tribunal's reading of the Task Force's Report, can such a finding be implied or inferred.

The Task Force had considered whether "the decision to terminate" had been inconsistent with the established procedures or guidelines. It noted that the Panel on Discrimination and other Grievances "had not specifically found any instances of discrimination against the staff members in question", including the Applicant. Furthermore, having studied the staffing tables of the Distribution Section in some detail, "looking at the relative seniority and qualifications of staff members holding fixed-term appointments as well as the type of post encumbered

(established, mission replacement, etc.)", the Task Force came to the conclusion that "while it was not possible to determine beyond a doubt what motivations lay behind the decision to transfer the two staff members [including the Applicant] from established to mission-replacement posts, that decision had increased their vulnerability", it did not find any motivation by malice or any violation of the Rules of the Organization.

As to the implication contained in the Applicant's submissions, that the Chief of the Section had orchestrated the vendetta which he alleges was waged against him, and that she had borne him ill-will, the Tribunal finds no evidence to support this suggestion. Rather, the Tribunal observes that the evidence would indicate to the contrary, as the Chief of the Section had on a number of occasions recommended the Applicant's contract for substantial extensions. Likewise, the Tribunal can find no evidence to support the Applicant's submission that the five-month extension afforded to him on 1 March 1998 was not in his interests nor made with the *bona fide* intention of retaining him in the Organization for as long a duration as could then be found. In fact, it appears to the Tribunal that had the Applicant not been offered this contract, he would have there and then been separated from service. The Tribunal can find no evidence to support the contention that this was done as part of a plan to eventually separate him from service when the said staff member returned back to Headquarters.

XI. As to the Applicant's claim that he enjoyed better overall performance ratings than his colleagues who were selected by the ad hoc Panel for redeployment, here again this claim is not supported by the evidence. Of the twenty-six General Service staff members, whose circumstances had been examined by the ad hoc Panel, some twenty-five of them had been rated as either "very good" or better, and some nine of those twenty-five had been rated as either "excellent" or "outstanding". Accordingly, the Applicant's rating, which was "very good", was no better than the rating of twenty-five of the twenty-six staff members in question, and some nine of them enjoyed a better rating than did the Applicant. Of the four persons recommended for redeployment, each of them had enjoyed a "very good" rating.

As to the Applicant's claim that his seniority ought to have been a decisive factor when considering those to be selected for redeployment, whilst it

is true to say that the Applicant had seniority over the four whose names had been selected for redeployment, the memorandum of 2 December 1997 had not indicated that where performance ratings were equal, seniority was to be the decisive factor. Under the terms of the memorandum, seniority was just one of a number of factors to be considered and weighed in the balance when determining who should be redeployed and who might have to be separated. The Tribunal has considered the report of the ad hoc Panel and finds nothing therein to support the contention that its deliberations or conclusions were flawed, improper or prejudiced or that it was influenced by any extraneous, improper or malicious consideration.

XII. In all of the circumstances, the Tribunal must reject the Applicant's claim that he was separated from service as a result of a vendetta, bias or prejudice; or that the decision breached any established procedures, Rules or Regulations or was influenced by any improper considerations.

XIII. As to the JAB's finding that his separation was the result of mismanagement problems "that his Section was facing during that time", the Tribunal has failed to find any evidence to support this conclusion.

Accepting for the purpose of the argument, that severe problems had existed within the Section and that poor management had "borne negatively on general conditions of work within the Section", the Tribunal can still not find any evidence to link these findings with the Applicant's submission that he had been vindictively singled out for invidious treatment or that the decisions of which he complains were motivated by any malicious intent.

XIV. As to the Applicant's claim that he was not offered reasonable consideration for a career appointment in accordance with General Assembly resolution 37/126 of 17 December 1982 and staff rule 104.12(b)(ii), the Tribunal is satisfied that this failure does not indicate that he was treated maliciously or differently from his colleagues in a similar situation. The Tribunal is satisfied that this failure is explained by the Secretariat-wide freeze on the granting of permanent appointments to holders of fixed-term appointments, which has existed since March 1992, except for a period between November 1994 and November 1995. The Applicant would not have been qualified for consideration under the

said General-Assembly resolution as between November 1994 and November 1995 as he, inter alia, had not at that time enjoyed five years of continuous service. It would have been obviously futile to have gone through the motions, as if giving consideration to the Applicant for a career appointment when, by reason of the said freeze, no such appointment could have been made.

Accordingly, the Tribunal is satisfied that no circumstances exist which would justify an award of compensation to the Applicant.

XV. In view of the foregoing, the Application is rejected in its entirety.

(Signatures)

Kevin **Haugh**
Vice-President, presiding

Spyridon **Flogaitis**
Member

Jacqueline R. **Scott**
Member

Geneva, 24 July 2003

Maritza **Struyvenberg**
Executive Secretary

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